No. 18-18

In the Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* VETERANS IN DEFENSE OF LIBERTY, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, AND CONGRESSIONAL PRAYER CAUCUS FOUNDATION *in support of Petitioners*

Steven W. Fitschen
The National Legal Foundation
524 Johnstown Rd.
Chesapeake, VA 23322

Frederick W. Claybrook, Jr.
(*Counsel of Record*)
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, DC 20001

Kevin T. Snider
Pacific Justice Institute
P.O. Box 276600
Sacramento, CA 95827

INTERESTS OF *AMICI CURIAE*[1]

Veterans in Defense of Liberty is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members of Veterans in Defense of Liberty continue to serve with the same passion and dedication to our country as we did in combat. We continue to honor our sacred oath to support and defend the Constitution of the United States. And we act with a heightened sense of continued duty to ensure that the sacrifices of our brethren who did not come home, were not made in vain.

When we raised our hands, we did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—to merely defend a piece of paper enshrined in our collective history. Rather we also pledged to defend the society and culture it has established and guided for 229 years. It doesn't matter if the topic is voter ID, immigration, national security or Religious Liberty. They are all veterans' issues.

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[1] Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to the file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel. ICECE's member organizations employ retired military chaplains as their officers.

The **Congressional Prayer Caucus Foundation** ("CPCF") is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

SUMMARY OF THE ARGUMENT

As the opinions below demonstrate, this Court's Establishment Clause jurisprudence contains conflicting strains. This case presents an opportunity for this Court to reconcile—where possible—those

strains and to announce a return to an Establishment Clause that would be recognizable to the Founders.

ARGUMENT

As the various opinions below demonstrate, this Court's decisions have passages that support a "strict separationist" view of the Establishment Clause that demands little, if any, public acknowledgement of religion in general and Christianity, this country's dominant religion, in particular, and passages that support the view that the Establishment Clause allows government to acknowledge and favor religion in an evenhanded manner. *Compare, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (the Establishment Clause prohibits "laws which . . . aid all religions" and referencing a "high and impregnable" wall of separation) (cited by panel majority below), *with Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence"), *and Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (the Establishment Clause's "line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"). This case provides an appropriate opportunity for the Court to align its case law with the original understanding and interpretation of the clause.

The central facts are not in dispute: the Bladensburg Cross has stood for close to a century and for years has been passed by thousands of motorists a day; it was erected as a memorial to the citizens of Prince George's County, irrespective of religious persuasion, who lost their lives in military service during World War I; the dominant religion at the time was Christianity (and still is); the Latin or Celtic cross is both a symbol of the specific, sacrificial death of Jesus Christ and, more generally, of sacrificial service; and similar memorial crosses were erected not only in this country, but throughout the world (e.g., at Arlington Cemetery in Virginia and various cemeteries and memorials for the Battle of the Somme in France). The panel majority, relying on the fact that many who supported the fundraising for the cross gave voice to the existence of a sovereign deity (like the Founding Fathers did in the Declaration of Independence), suggests that the cross might pass constitutional muster if its cross-pieces are sawn off or if it were in a close grouping of other memorials that had symbols that were specific to Judaism and Islam (and how many other religions and non-religions is left undisclosed). This is not a proper understanding of the Establishment Clause.

Of course, the clause as originally enacted only limited the Federal Government and coexisted with established churches in several states, which immediately casts doubt on the idea that the framers considered government inconsistent with religion, rather than supportive of it. But strict separationists, after incorporation of the clause through the Fourteenth Amendment, have pushed an

interpretation of the Establishment Clause that not only requires evenhanded treatment of various religions but forbids the government from favoring or acknowledging religion in any way, attacking, along with public memorials using religious symbolism, preferential tax treatment for religious organizations and ministers and recognition or commemoration of religious holidays observed by the large majority of its citizenry.

It is fair to say that the Founding Fathers, starting with George Washington and the First Congress, along with any other objective reader at the time, would be startled by the panel majority's wildly expansive interpretation of the text of the Establishment Clause. Instead, a proper understanding of the clause is that it was pro-religious, not anti-religious; it was designed to keep government out of religion, but not religion out of the public sphere. Moreover, the Establishment Clause is pro-marketplace of ideas. Like the other First Amendment freedoms of speech, press, and assembly, the clause assumes that the country's citizens are adults and will not be swayed by every whiff of government acknowledgement of the dominant beliefs of its citizens. Brought to bear on the facts of this case, it is more than far-fetched to argue that anyone who saw the Bladensburg WWI memorial, including plaintiffs, were influenced to believe in God or felt pressured to become a Christian because the generic symbolism of sacrificial service of the Bladensburg cross has a historical foundation in the death of Jesus Christ. That might give the memorial a deeper or

broader significance for many, but that is because of personal beliefs, not governmental importuning.

No one could reasonably believe that, by viewing the memorial, they were being forced to convert to Christianity or theism or being made to suffer any inducement to do so. The panel majority rightly held that using public funds to maintain the monument has a secular purpose of supporting a memorial for the county's war dead. But the panel majority was clearly wrong when it determined that maintaining a war memorial that uses symbolism most readily known to the majority of its citizenry for sacrifice places Christianity "above" other faiths. It simply recognizes the cross's dominance as recognized symbolism of personal sacrifice.

What the strict-separationist plaintiffs want in this case, and others like it, is a heckler's veto and the right to scrub the public sphere of all recognition of religion. That subverts the purpose of the Establishment Clause, which was to protect religion from the government, not to keep religion out of public life.

CONCLUSION

The *Amici* urge this Court to grant the petition for certiorari and to use this case to articulate an interpretation of the Establishment Clause more faithful to its original (and continuing) meaning.

Respectfully submitted,
this 2nd day of August 2018,

Frederick W. Claybrook, Jr.
Counsel of Record
700 Sixth St., NW, Ste. 430
Washington, DC 20001

Steven W. Fitschen
The National Legal Foundation
524 Johnstown Rd.
Chesapeake, VA 23322

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